

# **Ninth Meeting of European Labour Court Judges**

**Geneva, 3-4 December 2001**

## **AUSTRALIA**

### **THE ROLE OF LABOUR COURT JUDGES IN THE IMPLEMENTATION OF SOCIAL POLICIES**

#### **Questionnaire**

**General Reporter: Judge Stephen Adler, President  
National Labour Court of Israel**

#### **Background**

Australia does not have a national Labour Court but a quasi-judicial body called the Australian Industrial Relations Commission. The Commission exercises compulsory arbitral power in relation to industrial disputes about basic terms and conditions of employment including minimum wages. It may also exercise compulsory arbitration powers in a limited range of collective bargaining disputes, including those in which the economy or the welfare of the population are threatened. The enabling statute puts emphasis on the resolution of industrial disputes by conciliation with arbitration as a last resort. The Commission assists parties to reach agreement at the enterprise level and certifies agreements once reached. The commission also exercises a legislated jurisdiction for the protection of individual workers from unfair termination of employment and has the power to make rules of general application relating to redundancy. Enforcement of the Commission's awards and orders is a matter for the Federal Court of Australia which deals with the enforcement of Federal law generally. The Court also has a jurisdiction in relation to unlawful (as distinct from unfair) termination of employment.

#### **1 Labour Court Judges and Social Policy**

##### **a) In what areas do judgments of your or other courts in your country pertain to social policy by either implementing or creating policies?**

| <b>Possible areas:</b>                                                               | <b>Yes</b>               | <b>No</b>                |
|--------------------------------------------------------------------------------------|--------------------------|--------------------------|
| - freedom of association                                                             | <input type="checkbox"/> | <input type="checkbox"/> |
| - collective bargaining                                                              | <input type="checkbox"/> | <input type="checkbox"/> |
| - strikes                                                                            | <input type="checkbox"/> | <input type="checkbox"/> |
| - prevention of collective conflicts                                                 | <input type="checkbox"/> | <input type="checkbox"/> |
| - equality at the work place                                                         | <input type="checkbox"/> | <input type="checkbox"/> |
| - the definition of "employee"                                                       | <input type="checkbox"/> | <input type="checkbox"/> |
| - the definition of who is the "employer" of people performing certain types of work | <input type="checkbox"/> | <input type="checkbox"/> |

- the application of labour law to irregular, disguised, or ambiguous working relationships ☐ ☐
- education or occupational training ☐ ☐
- freedom of occupation and non-competition clauses ☐ ☐
- work safety ☐ ☐
- protection of vulnerable groups (such as unskilled people, foreign workers, disabled people, etc). ☐ ☐
- **other (please describe)**

All of the specified areas are dealt with in the exercise of the Commission's jurisdiction as described above. Two ILO Conventions form part of the statutory scheme: the Termination of Employment Convention, 1982 and the Workers with Family Responsibilities Convention, 1981. Other conventions dealing with the prevention and elimination of discrimination and encouraging freedom of association are implemented partially through specific legislative provisions.

**b) What has been, in general, the contribution of the labour courts in your country to the development of social policy? (Please see under (c) before answering this.)**

The Commission has been in existence, in one form or another, since 1904. (Until 1955 it was a Court). Because its role is primarily arbitral, its decisions frequently involve the creation of rights. Those decisions include value judgments as to the regulation of working relationships. Historically the Commission has played a pivotal role in developing social policy in a number of areas. In more recent years, following detailed legislative changes in 1993, the legislature provides greater guidance on social policy and accordingly the Commission's role is focussed more on implementation of policy through making decisions and awards which interpret and apply the policies spelled out in the statute.

**c) Relating specifically to freedom of association, what has been the labour courts' role in developing and/or implementing your country's social policy?**

Historically the Australian industrial system has been based on registration of industrial associations for the purpose of participation in the system in relation to employment in a particular occupation or industry. The objective of the registration system, prior to the 1990's, was to avoid overlapping representation rights and to avoid competition for membership between registered organisations. Since 1996 competition has been permissible. The Commission hears applications by new associations for registration and deals with applications by existing organisations to alter their coverage. In doing so it also ensures that the relevant statutory criteria as to size and type of organisation are complied with.

**d) Describe briefly some labour court judgments which have implemented or determined social policy; if possible, relating to freedom of association, including the protection or encouragement of trade unions and collective agreements.**

The Commission has established standards through test cases, in which all interested parties participated, on weekly ordinary working hours (currently 38), equal pay under the Commission's awards for aboriginal stockmen (1965), equal pay for women (1972), maternity leave, family leave, and annual cases to deal with applications to increase minimum wages. The Commission is currently considering an application to place restrictions on the aggregate number of hours or days that employees may work within certain periods.

**e) Have there been instances in which labour court decisions relating to social policy have been incorporated into statutes, changed by statutes, or adopted by the general courts?**

There have been examples of the substance of Commission decisions being incorporated in the statutory scheme. A recent example is the adoption by the legislature of the idea of a system of consistent minimum rates across all of the industries covered by the Commission's awards, with alterations in relative position only permissible on the basis of changes in work value. A second example is the incorporation in the statute of the scale of benefits decided upon by the Commission in a test case dealing with the notice and severance pay appropriate in cases of termination for redundancy. Commission decisions in the early 90's which gave primacy to collective bargaining over individual contract negotiations were effectively reversed by the legislature which put individual bargaining on an equal footing with collective bargaining.

**f) Is there a connection between social policy and social justice in labour court judgments? Please explain.**

There is a direct connection in Australia because of the Commission's arbitral function in relation to basic entitlements. The statute describes the Commission's responsibilities in the following way:

*"88B Performance of Commission's functions under this Part*  
...

*(2) In performing its functions under this Part, the Commission must ensure that a safety net of fair minimum wages and conditions of employment is established and maintained, having regard to the following:*

*(a) the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community;*

*(b) economic factors, including levels of productivity and inflation, and the desirability of attaining a high level of employment;*

*(c) when adjusting the safety net, the needs of the low paid.*

*(3) In performing its functions under this Part, the Commission must have regard to the following:*

*(a) the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed;*

*(b) the need to support training arrangements through appropriate trainee wage provisions;*

*(ba) the need, using a case-by-case approach, to protect the competitive position of young people in the labour market, to promote youth employment, youth skills and community standards and to assist in reducing youth unemployment, through appropriate wage provisions, including, where appropriate, junior wage provisions;*

*(c) the need to provide a supported wage system for people with disabilities;*

*(d) the need to apply the principle of equal pay for work of equal value without discrimination based on sex;*

*(e) the need to prevent and eliminate discrimination because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.”*

## **2      Labour Court Judges and Access to Justice**

- a)      What has been the contribution of the labour courts in your country to effectively ensuring the appearance before the judge on truly equal terms for all parties involved? To what extent is this contribution related to aspects such as cost (for instance, exemption from certain court costs for the financially weaker party); the possibility for workers to receive professional assistance by a lawyer or to be represented by other experts (for free?); the possibility for trade unions to appear in court (on their own behalf, as representatives of their members, and under what conditions if any); and the burden of proof?**

In industrial disputes parties may be represented by registered industrial organisations (either of employees or employers), which are usually relatively large and well-resourced, by lawyers or by paid agents. Where representation by agents or lawyers is opposed the Commission has a discretion to permit representation and usually does so. Individual litigants may also be represented by a registered organisation, a lawyer or agent. The Commission is required to impose a \$50 filing fee for applications for relief in relation to termination of employment. Costs may be awarded in such applications but this is infrequently done. Otherwise the Commission is not a costs jurisdiction. In practice it is only termination of employment cases in which individual litigants may not have the benefit of union representation. Impecunious litigants may have access to pro bono legal services. Some lawyers will act on a contingency basis. A significant number of applicants appear in person.

- b)      In what manner and to what extent is the labour court able to reconcile careful analysis leading to well-founded and impartial rulings, with the need, strongly felt in the area of labour law and social protection, for a rapid delivery of judgements? (This may include a discussion of issues such as the use of new technologies; “out-sourcing” of certain tasks (formerly) performed by judges; shortening of deadlines; oral procedures.)**

The Commission Rules provide that in termination of employment cases reasons for decision need not be given unless they are requested. Most members, however, prefer to give reasons. As to the production of timely well-reasoned decisions, the members of the Commission have a number of techniques available to them. In recent years professional development activities

have focussed on judgment writing. Many members deliver ex tempore decisions, even if the reasons are only delivered in outline, as often as possible. A central research department provides significant research and some drafting assistance. Most relevant authorities as well as the Commission's recent past decisions are now available in electronic form. Transcripts of hearing are also available in electronic form. Electronic search capability is very good. Joint decisions are routinely settled by email drafting. Bench books summarising relevant authorities are available in a number of areas. There is an increasing reliance on pre-trial directions, outlines of argument, written submissions (especially in appeals) and time limits on oral presentations. Listing procedures have also been modified in some areas to give an early indication of the trial date and adjournments are only given in exceptional circumstances. Decisions are available on the internet by 10.00am the day following their delivery.

- c) **Do you consider, in this regard, that the requirement of an efficient labour court raises the question for the judge to also develop personal managerial qualities?**

Without doubt.

### **3 Labour Court Status and Social Policies**

- a) **Is the role of your court, or other courts in your country, limited to the implementation of social policy set in statutes? Or do your court's judgments include judge-made law regarding social policy?**

From one perspective the Commission's role is only to implement the policy embodied in the enabling statute. The chief objects of the Workplace Relations Act 1996 are:

*"3 Principal object of this Act*

*The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:*

*(a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and*

*(aa) protecting the competitive position of young people in the labour market, promoting youth employment, youth skills and community standards and assisting in reducing youth unemployment; and*

*(b) ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level; and*

*(c) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act; and*

*(d) providing the means:*

*(i) for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards; and*

*(ii) to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment; and*

*(e) providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them; and*

*(f) ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and*

*(g) ensuring that employee and employer organisations registered under this Act are representative of and accountable to their members, and are able to operate effectively; and*

*(h) enabling the Commission to prevent and settle industrial disputes as far as possible by conciliation and, where appropriate and within specified limits, by arbitration; and*

*(i) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; and*

*(j) respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and*

*(k) assisting in giving effect to Australia's international obligations in relation to labour standards.”*

The many areas of discretion in the Commission’s arbitral powers are to be exercised with these objects in mind.

From another perspective, however, the Commission’s decisions do contribute to social policy. It is important to bear in mind that it is generally accepted that the national Parliament does not have the constitutional power to legislate directly for terms and conditions of employment - only a tribunal established by the Parliament may fix wages and conditions by arbitration. The Commission’s arbitrated decisions and awards influence general standards because they lead to the development of norms of behaviour which are deemed to be acceptable or fair in the community. For example, the Commission’s decisions on ordinary working hours are accepted as representing a fair standard. The same is true of decisions relating to parental leave and family leave. They establish standards which the community generally accepts. Decisions, especially at the appellate level, in termination of employment cases also contribute to notions of what fair treatment is in relation to termination of employment. In the Commission’s annual review of minimum wages it is required to balance the need to ensure adequate remuneration and the need to attain a high level of employment.

The Commission is currently hearing an application by the peak union body to vary a number of major awards by introducing restrictions on the maximum number of hours that employees may work. The case is supported by, among other things, the developments in Europe including the EU Working Time Directive. The Commission is being urged to restrict working hours because of the lack of a public policy response at Government level.

- b) **In your opinion, should labour courts adopt a role of “judicial activism”, especially relating to judge-made social policy?**

Some “judicial activism” is inevitable although in a context in which the term has a different application. The statutory regime invites the Commission to implement the policy objectives (set out above) in exercising its powers.

#### **4 The Judge’s Personal Condition and Social Policy**

- a) **What is the role of individual judges’ personal values, philosophy and outlook on life in their judgments? What is their role (personal influence) in deciding social policy issues?**

It is not possible to deal with this issue other than in general terms. It is beyond doubt that the experience of judges influences their judgments, even if the judge is not conscious of the way in which that influence works. But a judge also strives to counter any predisposition arising from philosophical or cultural beliefs and to decide matters impartially. That is a constant and necessary part of the judicial reasoning process.

- b) **How do judges learn about social problems, social issues at the workplace and social values? In other words, how are judges trained to deal with social policy?**

and

- c) **Is this adequate in your view, and how should they be trained?**

Judges should not need any training on social policy issues other than that offered by the submissions of the parties appearing before them and the judgments of appeal or review benches. Unfortunately some professional development beyond that is needed in some cases - this is best provided by other judges with some assistance from experts.

#### **5 Lay Judges, Professional Judges and Social Policy**

**In case your labour courts have professional and lay judges:**

- a) **What is the role of lay judges (public representatives) in implementing and making social policy and deciding issues relating to social policy?**
- b) **What is the lay judges’ contribution to the judgement itself, if any? (Would they be able to overrule the professional judge, for example?)**
- c) **Are the perspectives and ideas of lay judges on social policy different than those of the professional judges?**

- d) Are there any patterns in the way lay judges decide on matters relating to social policy? For example, do lay judges representative of labour usually vote to implement social rights while lay judges representative of management vote to oppose them?